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Case No. 04-1324

IN THE SUPREME COURT OF THE UNITED STATES

PATRICK A. DAY, *Petitioner*,

vs.

JAMES V. CROSBY, JR. Secretary, Florida
DEPARTMENT OF CORRECTIONS, *Respondent.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

[Petitioner's Version]

1. Does the State waive a limitation defense to a habeas corpus petition when it fails to plead or otherwise raise that defense and expressly concedes that the petition was timely?

2. Does Habeas Rule 4 permit a district court to dismiss a habeas petition *sua sponte* after the State had filed an answer based on a ground not raised in the answer?

[Restated by Respondent]

Does public policy underlying the AEDPA allow a district court to sua sponte apply the limitation period in 28 U.S.C. §2244(d)(1) **whenever** a habeas petition appears untimely, absent prejudice to the petitioner?

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DEPARTMENT OF CORRECTIONS, *Respondent.*

OPINIONS BELOW

Respondent accepts Day's statement.

JURISDICTION

Respondent accepts Day's statement.

STATUTORY PROVISIONS INVOLVED

Respondent accepts Day's statement, but adds: current Habeas Rule 4 provides in relevant part:

> If it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner.

Current Habeas Rule 11 provides in relevant part:

> The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any statutory provision or

these rules, may be applied to a proceeding under these rules.

STATEMENT OF THE CASE

The crucial issue is whether a state habeas petitioner can wield the rules of civil procedure to keep a windfall; that is, the mistaken concession his habeas petition was timely. Day would do so--flatly contradicting the strong concern for comity, federalism and finality in the Anti-terrorism & Effective Death Penalty Act (AEDPA)--while not disputing his habeas petition was late and in the absence of prejudice.

Day, a state prisoner, is serving 55 years for second-degree murder with a weapon. (cert. pet., p.4). Responding to his federal habeas petition, Respondent miscalculated the amount of the limitation period[1] which had elapsed. Based on this mistake, Respondent conceded the petition was timely and answered on the merits. But for the miscalculation, he would not have done so.[2]

Factually, Day's petition was late from the outset. The district court recognized the potential time bar, and issued an order for Day to show cause why his petition should not be dismissed. Upon Day's reply, the court found 353 days elapsed while Day had nothing pending[3] in the state courts. Twelve days later, the limitation period expired. Because Day did not file his habeas petition for 23 more days, the petition was untimely. *See* Magistrate's Report and Recommendation. (Pet. App., p. 12a).[4]

All of this occurred very early in Day's habeas proceeding. His petition had been accepted. It and Respondent's answer were being considered in due course, when the district court raised the possibility the petition was filed too late. Respondent sought summary denial on the merits; there had been no discovery or evidentiary hearing.

Under these facts, the Eleventh Circuit described Respondent's concession as "patently erroneous,"without more. *See e.g.*, 391 F.3d at 1192. It also made two observations which lie at the heart of its decision:

> This appeal presents a distinction without a difference; there is no meaningful difference between an erroneous failure to plead the statute of limitations as an affirmative defense, as occurred in *Jackson*, and a concession of timeliness that was patently erroneous, as occurred here. In an ordinary civil case, a failure to plead the bar of the statute of limitations constitutes a waiver of the defense. But a habeas case that is governed by AEDPA is not controlled by this rule. Under *Jackson*, a failure to plead the defense does not bar the district court from raising the issue *sua sponte* and ordering the petitioner to show cause why the petition should not be dismissed.

* * *

---

[1] *See* 28 U.S.C. §2244(d)(1) ("A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court.").

[2] Counsel for Respondent correctly determined the number of days of untolled time which elapsed during Day's state court proceedings, but neglected to add the number of days which passed between conclusion of those proceedings and the filing of his habeas petition.

[3] *See* 28 U.S.C. §2244(d)(2) ("The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.").

[4] The appendix to Day's certiorari petition is cited (Pet. App., p.__). Throughout, emphasis supplied by Respondent is noted as [e.s.].

> A federal court that sits in collateral review of a criminal judgment of a state court has an obligation to enforce the federal statute of limitations. When it enacted AEDPA, Congress circumscribed our review in habeas cases to promote comity, finality, and federalism, and Congress enacted the AEDPA statute of limitations as the principal tool to "serve[] the well-recognized interest in the finality of state court judgments. *Duncan v. Walker*, 533 U.S. 167, 179, 121 S. Ct. 2120, 2128, 150 L. Ed. 2d 251 (2001)[.] [other citations omitted].

391 F.3d at 1194 [e.s.].

The Eleventh Circuit relied on the public policy expressed by Congress through the AEDPA. It rejected mechanistic application of a civil principle, that an affirmative defense is waived by failure to raise it. The court determined the AEDPA trumps Habeas Rule 4, as the strong purpose behind that Act cannot be defeated by a civil, procedural rule; and, in the language just quoted, found the district court had an "obligation to enforce the federal statute of limitations." *Id.*

REASONS FOR DENYING THE WRIT

I. ANY NOMINAL CONFLICT AMONG THE CIRCUIT COURTS IS NOT IMPORTANT ENOUGH TO JUSTIFY CERTIORARI REVIEW.

A. No Conflict as to Waiver of the Limitations Defense Through Failure to Raise It.

Day's habeas petition was time-barred before the district court ordered a response. Had the court recognized the that bar, it could have issued the same show cause order before any response. Day concedes at least four circuits, besides the Eleventh, have held a district court may summarily dismiss before the state answers. (cert. pet., p.11 at n.10). As observed in Bendolph, *infra*, all circuits addressing the issue have found a district court may raise the limitation period sua sponte--the only difference is when.

Absent prejudice, it does not matter *when* the limitation period is raised. To conclude otherwise is to elevate form (civil procedure) over the substance of the AEDPA.

Day asks this court to accept those decisions which treat the habeas limitation period as a civil, affirmative defense; and find conflict with the decisions that do not do so. In opposition, Respondent can do no better than these very recent observations by the Third Circuit (en banc):

> Finally, we consider the argument contra, a thumbnail sketch of which is this: Habeas cases are civil, governed by the Federal Rules of Civil Procedure. As such, the AEDPA statute of limitations must be treated like any other in a civil case. Therefore, it is a defense possessed by the habeas respondent alone, and courts may not intervene.

> The argument plainly rests on the premise that habeas cases and ordinary civil cases are indistinguishable, something we disagreed with in Long and do so again today. *See, e.g.*, Harris v. Nelson, 394 U.S. 286, 293-94, 89 S. Ct. 1082, 1087-88, 22 L. Ed. 2d 281 (1968) ("It is, of course, true that habeas corpus proceedings are characterized as 'civil.' . . . But the label is gross and inexact. Essentially, the proceeding is unique. Habeas corpus practice in the federal courts has conformed with civil practice only in a general sense.") (internal citations and footnote omitted); Long, 393 F.3d at 402 ("While civil in nature, habeas corpus cases are different from ordinary civil cases where only the interests of the parties are involved.") (*citing* Acosta [v. Artuz, 221 F.3d 117 (2d Cir. 2000] at 123); *see also* O'Brien v. Moore, 395 F.3d 499, 505 (4th Cir. 2005) (noting the unique hybrid nature of habeas actions and collecting cases observing same); Walker v. O'Brien, 216 F.3d 626, 636 (7th Cir. 2000) (observing that habeas cases are a "group unto themselves"); Brown v. Vasquez, 952 F.2d 1164, 1169 (9th Cir. 1991) (noting habeas corpus is "dramatically different from any other type of civil action").

United States v. Bendolph, 2005 U.S. App. LEXIS 8635, 28-30 (3d Cir., May 16, 2005) (en banc). *See* Herbst v. Cook, 260 F.3d 1039, 1042 (9th Cir. 2001) (recognizing that district courts may sua sponte dismiss untimely habeas petition when notice and opportunity to respond have been given, but not considering the effect of a state response on such discretion). *See also* Kiser v. Johnson, 163 F.3d 326, 328 (5th Cir. 1999) (distinguishing habeas cases from civil litigation, and holding Habeas Rule 4 allows sua sponte dismissal of untimely petition before an answer or other pleading by the state; but without addressing prejudice).

Specifically, Day first posits conflict on the premise the Eleventh Circuit allows district courts to find a habeas petition untimely, despite a respondent's waiver of the limitation period "by failing to raise it." (cert. pet., p.9-11). Second, he asserts conflict based on the Eleventh Circuit's interpretation of Habeas Rule 4. (cert. pet., p.11-13). To reach this end, he relies on cases interpreting the former versions of Habeas Rules 4 and 11.

Current Habeas Rule 4 provides in relevant part:

> If it plainly appears from the petition . . . the petitioner is not entitled to relief in the district court, the judge must dismiss the petition[.]

Under this language, plain disentitlement to relief--such as a time-barred petition--compels dismissal. Moreover, nothing in this language or the remainder of Rule 4 expressly prohibits later dismissal due to untimeliness. To the contrary, the district court has no discretion to allow the proceeding to continue. *Cf.* Pliler v. Ford, 542 U.S. 225 (2004) (holding: "The combined effect of Rose [v. Lundy, 455 U.S. 509, 102 S. Ct. 1198 (1982)] and AEDPA's limitations period is that if a petitioner comes to federal court with a mixed petition toward the end of the limitations period, a dismissal of his mixed petition could result in the loss of all of his claims[.]").

Current Habeas Rule 11 reads:

> The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any statutory provision or these rules, may be applied to a proceeding under these rules.

Contradicting Rule 11, Day can find conflict only by elevating Civil Rule 8(c) and 12(b) over a "statutory provision" (AEDPA). Essentially, he posits conflict by contending a

respondent's concession of timeliness can never be revisited, because the habeas limitation period is the equivalent of an affirmative, civil defense; waived when not pled under civil rules 8(c) and 12(b).

Day's position disregards the strong concern for comity underlying AEDPA. As this Court has said:

> There is no doubt Congress intended AEDPA to advance these doctrines [of comity, finality, and federalism]. Federal habeas corpus principles must inform and shape the historic and still vital relation of mutual respect and common purpose existing between the States and the federal courts. In keeping this delicate balance we have been careful to limit the scope of federal intrusion into state criminal adjudications and to safeguard the States' interest in the integrity of their criminal and collateral proceedings. *See, e.g.*, Coleman v. Thompson, 501 U.S. 722, 726, 115 L. Ed. 2d 640, 111 S. Ct. 2546 (1991) ("This is a case about federalism. It concerns the respect that federal courts owe the States and the States' procedural rules when reviewing the claims of state prisoners in federal habeas corpus"); McCleskey v. Zant, 499 U.S. 467, 493, 113 L. Ed. 2d 517, 111 S. Ct. 1454 (1991) ("The doctrines of procedural default and abuse of the writ are both designed to lessen the injury to a State that results through reexamination of a state conviction on a ground that the State did not have the opportunity to address at a prior, appropriate time; and both doctrines seek to vindicate the State's interest in the finality of its criminal judgments").

Williams v. Taylor, 529 U.S. 420, 436, 120 S.Ct. 1479, 1490 (2000).

This Court has similarly described the AEDPA's one-year limitation period:

> And AEDPA's limitations period--with its accompanying tolling provision--ensures the achievement of this goal because it promotes the exhaustion of state remedies while respecting the interest in the finality of state court judgments. [e.s.; internal quotes & cites omitted].

Carey v. Saffold, 536 U.S. 214, 220, 122 S.Ct. 2134, 2138 (2002).

Given the AEDPA's goal of "promoting comity," a federal court has greater flexibility in broaching the habeas limitation period than it would raise a foregone limitation period in typical civil litigation. *See* Hill v. Braxton, 277 F.3d 701, 705 (4th Cir. 2002) ("Actions brought pursuant to §2254 implicate considerations of comity ... to a degree not present in ordinary civil actions. These interests eclipse the immediate concerns of the parties and provide federal habeas courts the discretionary authority to raise affirmative defenses that have not been preserved by the state.").

In contrast to the decision below, the cases upon which Day posits conflict were decided before current Habeas Rules 4 & 11 were adopted. All elevate the civil and habeas procedural rules over federalism, comity and finality as promoted by the AEDPA. *See* Nardi v. Stewart, 354 F.3d 1134, 1141 (9th Cir. 2004) (relying on prior rule 4 and observing that "Rule 4 authorizes a summary dismissal only prior to a responsive pleading by the state[;]" without mention of rule 11 or the policy concerns of the AEDPA); Scott v. Collins, 286 F.3d 923, 931 (6th Cir. 2002) (considering prior rule 4 only, with no mention of AEDPA policy; but observing that the result reached did not "prohibit a court from dismissing a habeas petition on statute of limitations

grounds at a later time if the respondent raises the statute of limitations affirmative defense").

Day's reliance on Robinson v. Johnson, 313 F.3d 128 (3d Cir. 2002), to establish conflict is particularly unavailing, as that decision neglects the AEDPA's concern for federalism. Lastly, Day relies on Davis v. LeMaster, 216 F.3d 1086 (10th Cir.) (table), 2000 U.S. App. LEXIS 11866 (2000) (unpub.). There, the court observed in dicta that the petition was untimely. It found the issue waived because it had never been raised. Given the case was already on appeal, the court's finding of waiver is not surprising. It does not show conflict under the facts of this case.

B. No Conflict as to Habeas Rule 4.

Relying on Nardi and Scott, Day claims conflict arises because the Eleventh Circuit allows a district court to address timeliness after the habeas petition has been answered. However, the record shows only that Respondent had answered on the merits. Nothing else had happened. [5] Later, the district court issued a show-cause order questioning the timeliness of Day's petition.

The habeas proceeding was at its earliest stages when the district court *sua sponte* raised the limitation period. There had been no delay attributable to Respondent; the district court apparently was considering the petition and the answer in due course.

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[5] In all the proceedings below, Day has never contended his petition was actually filed on time. The district court found his assertions "insufficient to justify application of the equitable tolling doctrine." (Pet. App. 13a). The Eleventh Circuit's decision did not bother to address them. (Pet. App. 4a-6a).

Under Habeas Rule 6, permission leave of court must be obtained for discovery. Day had not done so. He could not have been conducting discovery during the time which passed, and did not forego anything. Restated, the concern over unnecessary delay or misguided discovery, which requires affirmative defenses to be raised early in typical civil litigation, was not present. The strictures of Civil Rule 8(c), requiring affirmative defenses to be set forth at the first responsive pleading, were not present.

To the contrary, had Respondent discovered the erroneous concession of timeliness and moved to withdraw the answer and seek dismissal; the district court would have had the discretion to allow it. *Cf.* Fed.R.Civ.P. 15 (directing that leave of court to amend pleadings "be freely given when justice so requires"); Long v. Wilson, 393 F.3d 390, 404 (3d Cir. 2004) (concluding the "District Court impliedly granted leave to amend in a proper exercise of its discretion by denying the petition as untimely").

When, as here, a habeas petition has been answered, but nothing more has happened, there is no justification for distinguishing between *sua sponte* dismissal before versus after the answer. Any nominal conflict between the decision below, and Nardi and Scott, is not important enough to justify certiorari. *See* Supreme Court Rule 10(c) (declaring, as a reason for certiorari review, that a "United States court of appeals had decided an important question of federal law that has not been, but should be, settled by this Court[.]" [e.s.]).

C. Resolution of Important Issues.

Given the AEDPA's strong underpinnings in federalism, comity, and finality of state criminal convictions; there is no reason to limit whether or when a district court can raise the limitation period in §2244(d)(1), absent prejudice to a habeas

petitioner. The Eleventh Circuit's decision was correct, and further review is not warranted.

The major flaw of Day's argument emerges, when he advocates blind reliance upon the rules of civil procedure without regard to the AEDPA and the lack of prejudice to himself. No federal decision supports his position, at least absent prejudice. *See* Bendolph, 2005 U.S. App. LEXIS 8635 at *26 (observing, in the context of a habeas petition under §2255: "[A]ll of the courts of appeals that have considered the issue agree that courts do possess a sua sponte power to raise the limitations issue[;]" noting that disagreement has arisen over when the issue can be so raised; and compiling cases).

Bendolph then focused on what should be the determinative factor--prejudice to the petitioner, rather than procedural nicety:

> Because the District Court flagged timeliness after the Rule 4 period had ended, we must next consider the ultimate issue, prejudice to Bendolph. We look first to how late in the case the limitations issue was raised. Here, as stated, the District Court raised the issue on August 24, 2000; the government, in turn, did so on October 5, 2000. These two events occurred almost two years after October 18, 1998, the date Bendolph filed his § 2255 motion. During that time, the record reflects the following activity in Bendolph's case: he filed a motion to compel discovery, which was denied; the case was reassigned upon the retirement of the District Judge; and Bendolph was ordered to make an election pursuant to United States v. Miller, 197 F.3d 644 (3d Cir. 1999). On these facts, the raising of timeliness was not so late that Bendolph was prejudiced. There is no evidence that he had commenced costly or time-consuming discovery, suffered a loss or a diminution of his ability to prepare his case, or lost another litigation opportunity elsewhere. As such, while delay is related to prejudice, and while a period of almost two years may be strong evidence of prejudice in another case, it was not a problem here. The prejudice inquiry looks next to whether Bendolph had sufficient opportunity to respond to the issue, once raised. [e.s.; cites & internal quotes omitted].

Id., 2005 U.S. App. LEXIS 8635 at *37-9.

Absent prejudice[6] to a habeas petitioner to overcome the timeliness issue, a district court has authority to raise the limitation period at any time throughout the litigation. Here, the district court sua sponte raised the timeliness issue after Respondent had answered, but before anything else had happened in the case. Under these facts, Day's petition does not present issues or caselaw of sufficient importance to justify certiorari review.

II. THE ELEVENTH CIRCUIT'S DECISION WAS NOT CONTRARY TO THE CIVIL RULES AND HABEAS RULE 4.

Day has urged the decision below conflicts with other circuit court decisions involving federal civil rules of procedure and Habeas Rule 4. Next, he advances the same allegation a free-standing ground for certiorari.

Day's position flies in the face of Gonzalez v. Crosby, case no. 04-6432, 2005 U.S. LEXIS 5014 (June 23, 2005). In essence, Gonzalez held state habeas petitioners cannot use a motion for relief from judgment under Civil Rule 60(b) to present new claims for relief. *See id.* at *12-14 (observing: "These statutes,

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[6] An example of prejudice would be that evidence justifying equitable tolling became unavailable during the pendency of the respondent's answer, only to have the court sua sponte raise the limitation defense.

and our own decisions, make clear that a 'claim' as used in § 2244(b) is an asserted federal basis for relief from a state court's judgment of conviction." and "Virtually every Court of Appeals to consider the question has held that such a pleading, although labeled a Rule 60(b) motion, is in substance a successive habeas petition and should be treated accordingly.").

As Gonzalez explains:

> Using Rule 60(b) to present new claims for relief from a state court's judgment of conviction--even claims couched in the language of a true Rule 60(b) motion--circumvents AEDPA's requirement that a new claim be dismissed unless it relies on either a new rule of constitutional law or newly discovered facts. §2244(b)(2). The same is true of a Rule 60(b)(2) motion presenting new evidence in support of a claim already litigated: even assuming that reliance on a new factual predicate causes that motion to escape §2244(b)(1)'s prohibition of claims "presented in a prior application," §2244(b)(2)(B) requires a more convincing factual showing than does Rule 60(b). Likewise, a Rule 60(b) motion based on a purported change in the substantive law governing the claim could be used to circumvent §2244(b)(2)(A)'s dictate that the only new law on which a successive petition may rely is "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." In addition to the substantive conflict with AEDPA standards, in each of these three examples use of Rule 60(b) would impermissibly circumvent the requirement that a successive habeas petition be precertified by the court of appeals as falling within an exception to the successive-petition bar. § 2244(b)(3).

Id. at *14-15.

The Gonzalez rationale applies with extra force here. Habeas Rule 11 was amended in a manner seeming to be a direct nod to the AEDPA, by declaring the civil rules apply when not "inconsistent with any statutory provisions." Habeas Rule 4, while literally speaking to a pre-answer dismissal, still requires dismissal when the "petition and any attached exhibits"plainly show the petitioner is not entitled to relief. Both must be interpreted to effect the AEDPA's concern for federalism and finality of state criminal judgments. That concern weighs very strongly against allowing a state prisoner to keep a windfall.

Were this not enough, an earlier passage from Gonzalez makes it clear that the absence of express limitation or modification of the Civil rules cannot trump the AEDPA:

> AEDPA did not expressly circumscribe the operation of Rule 60(b). (By contrast, AEDPA directly amended other provisions of the Federal Rules. *See, e.g.*, AEDPA, §103, 110 Stat. 1218 (amending Fed. Rule App. Proc. 22).) The new habeas restrictions introduced by AEDPA are made indirectly relevant, however, by the fact that Rule 60(b), like the rest of the Rules of Civil Procedure, applies in habeas corpus proceedings under 28 U.S.C. § 2254 only "to the extent that [it is] not inconsistent with" applicable federal statutory provisions and rules. 28 U.S.C. §2254 Rule 11; *see* Fed. Rule Civ. Proc. 81(a)(2). [footnote omitted]. [e.s.].

Id. at *10.

Here, Day would elevate inadvertent concession his habeas petition was timely into a "right" to review of his petition on the merits. In so doing, he contradicts the AEDPA's strong concern for federalism and finality of state criminal judgments, and current Habeas Rule 11. He seeks consideration on the merits of an untimely petition, based not on any equitable or statutorily-

recognized consideration, but only on an erroneous concession by Respondent. To do so, he would elevate civil procedural rules over the policy underlying the AEDPA, in the absence of prejudice or "extraordinary" consideration. *Cf. id.* at *20 ("[O]ur cases have required a movant seeking relief under Rule 60(b)(6) to show "extraordinary circumstances" justifying the reopening of a final judgment.").

Ironically, the procedural history of Gonzalez strongly supports Respondent's position here. Gonzalez moved under Rule 60(b)(6) for reconsideration of how the one-year limitation period applied to his habeas petition, in light of Artuz v. Bennett, 531 U.S. 4 (2000). He did 9 months after Artuz issued, and over a year after a certificate of appealability had been denied. Gonzalez at *6-7. While this Court ultimately agreed denial of Gonzalez's motion was correct on the merits, it held the motion was not categorically barred by the AEDPA; specifically, 28 U.S. C. §2244(b).

If the AEDPA does not to bar a motion--long after dismissal--such as the one in Gonzalez, then Day cannot rely on a strict reading of Habeas Rule 4 (and the Civil Rules as to affirmative defenses) to bar sua sponte application of the limitation period. He certainly cannot do so when the district court raised the limitation period very early in the habeas proceeding while giving him opportunity to respond, and he had never claimed the petition was timely.

The same respect for the ADEPA's one-year limitation period motivated this Court to reject the Ninth Circuit's broad application of Civil Rule 15. Describing the issue as whether, under Rule 15(c)(2), an amended habeas petition relates back to the date of the "originally timely filed petition," the court concluded:

> An amended habeas petition, we hold, does not relate back (and thereby escape AEDPA's one-year time limit) when it asserts a new ground for relief supported by facts that differ in both time and type from those the original pleading set forth.

Mayle v. Felix, 2005 U.S. LEXIS 5016 *12 (June 23, 2005).

Here, Day would escape the AEDPA's one-year limitation period based solely on an inadvertent concession of timeliness, in the absence of prejudice and any contention his petition was timely. Mayle also teaches the Eleventh Circuit's decision was correct, and that certiorari is not warranted.

It would be a miscarriage of justice to treat Respondent's concession of timeliness as a right vesting in Day. He cannot show prejudice, and does not dispute the lateness of his petition. The decision below comports with the authorities discussed---the AEDPA and this Court's most recent habeas jurisprudence, and current Habeas Rules 4 and 11. Day's second reason for granting the writ would elevate the rules of civil procedure above all these, and must be rejected.

One more point is necessary. Respondent relies on the current version of Habeas Rules 4 and 11, as amended in December 2004. Following Rule 4 is this committee note:

> The language of Rule 4 has been amended as part of general restyling of the rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic and no substantive change is intended, except as described below.

A similar note appears as to Rule 11. Intuitively, it is difficult to accept the committee's note that the changes to Rules 4 and 11

are merely stylistic or clarifying. After all, Rule 11 was changed to say the civil rules apply to "the extent that they are not inconsistent with any statutory provisions" [e.s.]--a direct acknowledgment of the AEDPA.

This Court has recently minimized the differences between the prior and current Habeas Rules. *See* Mayle at *10 n.1 ("The Habeas Corpus Rules were recently amended, effective December 1, 2004. Because the amended Rules are not materially different from those in effect when Felix filed his habeas petition, this opinion refers to the current version of the Rules."). If, then, the 2004 changes to the Habeas Rules are just stylistic and clarifying, the decision below would have reached the correct result under the prior rules. There is no misinterpretation or contradiction of the Habeas Rules in the Eleventh Circuit's decision.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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